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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 148

TIDE WATER ASSOCIATED OIL COMPANY,
Appellant,

vs.

L. G. ROBISON, ON BEHALF OF OIL WORKERS INTERNATIONAL UNION LOCAL 445

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF CONTRA COSTA

STATEMENT AS TO JURISDICTION

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF CONTRA COSTA

No. 51972

L. G. ROBISON, ON BEHALF OF OIL WORKERS INTERNATIONAL UNION LOCAL 445,

Plaintiff and Appellee,

vs.

TIDE WATER ASSOCIATED OIL COMPANY,

Defendant and Appellant

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, defendant-appellant Tide Water Associated Oil Company submits this statement particularly disclosing the basis on which the Supreme Court has jurisdiction on appeal to review the judgment of the Superior Court of the State of California, in and for the County of Contra Costa entered in this cause.

Opinions Below

The case was appealed from the Justice Court for the First Township, County of Contra Costa, State of California, where it originated, on questions of both law and fact to the Superior Court of the State of California, in

and for the County of Contra Costa, where it was tried *de novo*. The Superior Court did not render an opinion. The opinion of the Justice Court is unreported but a copy is attached hereto as Appendix A.

Jurisdiction

The judgment of the Superior Court was entered on February 6, 1952. A notice of intention to move for a new trial was filed by defendant-appellant on February 18, 1952; the motion was heard on March 31, 1952, and was denied on April 2, 1952. A petition for appeal to the Supreme Court of the United States is presented to the Superior Court herewith on May 1, 1952. Inasmuch as the petition is presented within 90 days of the entry of judgment, the appeal is timely (Title 28, U. S. C., Sec. 2101(c)).

The judgment of the Superior Court is that of the highest court of the State in which a decision could be had. Inasmuch as the case is one at law in which the demand, exclusive of interest, amounts to less than $300, it lay within the original jurisdiction of the Justice Court (Cal. Code Civ. Proc. Sec. 12) and hence did not fall within the original jurisdiction of the Superior Court (Cal. Const. Art. VI, Sec. 5). An appeal lay from the Justice Court to the Superior Court on questions of both law and fact (Cal. Code Civ. Proc. Sec. 974). The case was trialable *de novo* in the Superior Court (Cal. Code Civ. Proc. Sec. 980a) and the judgment of the Superior Court had the same force and effect as if the action had been commenced therein (Cal. Code Civ. Proc. Sec. 980c). However, since the case was not one within the original jurisdiction of the Superior Court, there was no further right of appeal and the Superior Court was the highest court in which a decision could be had (Cal. Const. Art. VI, Sections 4, 4b, 5; *Berkeley Guarantee Bldg. and Loan Ass'n* v. *Cunningham*, 218 Cal. 714, 24

P. (2d) 782; *McClean* v. *Freiberger*, 215 Cal. 1, 7 P. (2d) 1023; *Bartnett* v. *Hull*, 19 Cal. App. 91, 124 Pac. 885).

The suit was one to recover wages for time taken from work by employees on an election day, the claim being predicated upon a California statute, the validity of which was drawn in question by defendant-appellant as being repugnant to the Constitution of the United States. The judgment of the Superior Court was in favor of its validity. The jurisdiction of the Supreme Court of the United States to review this decision by direct appeal is conferred by Title 28 U. S. C. Sec. 1257(2). *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U. S. 421.

Question Presented

Is the due process clause of the Fourteenth Amendment of the United States Constitution violated by a state statute which entitles an employee, on the day of an election, to take two hours off from his regularly scheduled working hours, with pay, regardless of how much time he may have outside of working hours within which to vote, and at a time selected by himself unilaterally without consulting his employer's convenience or necessities? Does the requirement that the employee be given two hours off with pay regardless of how much time he may have outside of working hours in which to vote have any relation to a legitimate end? Does the right conferred upon the employee to select the time to be taken unilaterally and without consulting his employer's convenience or necessities bear such a relation?

Statute Involved

The statute involved is Section 5699 of the California Elections Code (Cal. Stats. 1939, p. 214). That section reads, in its entirety, as follows.

> "Every voter shall, on the day of every general, direct primary or presidential primary election at

which he is entitled to vote, be entitled to absent himself from any service or employment in which he is then engaged for two consecutive hours between the time of opening and the time of closing the polls. The voter shall not, because of so absenting himself, be liable to any penalty, nor shall any deduction be made on account of such absence from his usual salary or wages."

Statement of the Case

Defendant-appellant owns and operates an oil refinery at Avon near Martinez, California, at which it employs approximately 1650 workers (Tr. 38).[1]

A substantial portion of the employees at the refinery are employed in around the clock production operations (Tr. 38). The production of gasoline and other petroleum products requires continuous operation of the various stills, fractionators, evaporators and other facilities employed in the production process (Tr. 47). If these facilities, which cost millions of dollars, were to be left unattended for any substantial period, the resultant damage would be serious and might very well be catastrophic (Tr. 47-48). Consequently, workers employed in the operation of these facilities are divided into three shifts. The first shift begins at 6:45 A. M. and ends at 2:45 P. M., the second shift begins at 2:45 P. M. and ends at 10:45 P. M., and the third shift begins at 10:45 P. M. and ends at 6:45 A.M. (Tr. 38). On election days, the California polls are open from 7:00 A. M. to 7 P. M. or later (California Elections Code, Secs. 5556, 5557, 5734). Consequently, employees on the first shift above mentioned have over four hours after the end of their day's work within which to vote, employees on the second

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[1] Transcript references, unless otherwise stated, are to the reporter's transcript of the proceedings upon the trial in the Superior Court.

shift have nearly eight hours before commencement of their shift in which to vote, and employees on the third shift have all day in which to vote.

In addition to the production workers, there are certain maintenance and other workers who also work shifts (Tr. 38-39). The first shift for such workers commences at 8:00 A. M. and runs to 4:00 P. M., the second shift runs from 4:00 P. M. to midnight, and the third shift runs from midnight to 8:00 A. M. (Tr. 39). In this group, employees on the first shift have three hours after the end of their shift in which to vote, employees on the second shift have nine hours before commencement of their shift in which to vote, and employees on the third shift have eleven hours after the end of their shift in which to vote.

The remainder of the employees at the refinery are so-called day workers whose workday begins at 8:00 A. M. and ends at 4:45 P. M., with forty-five minutes out for lunch (Tr. 39). These employees have at least 2¼ hours after their regular quitting time in which to vote.

June 6, 1950, was a primary election day. On that day approximately 100 day workers in the mechanical department of the refinery walked off the job at approximately 2:45 P. M., two hours before their regular quitting time of 4:45 P. M. (Tr. 218). Several days prior to the election, defendant-appellant had posted on all bulletin boards, including those located in the shops of the mechanical department, a notice reading as follows (Tr. 219; Def. Exhibit 1):

> "All employees who are registered voters are urged to exercise their electoral franchise by casting their ballots at the California Primary Election on Tuesday, June 6, 1950.
>
> "The polls will be open from 7 A. M. until 7 P. M. Therefore, employees should have ample time to vote

> without absenting themselves during regular working hours. However, if there may be a substantiated need, in individual cases, for additional time required to vote, employees may be granted two hours off for such purpose upon application to and approval of the Department Head."

However, none of the employees here involved sought permission of their department head to leave work; they simply walked out as above stated (Tr. 221).

Most of the employees upon whose claims recovery ultimately was allowed lived and voted either at Concord or Martinez, each of which was only 4½ miles by paved highway from the refinery (Tr. 42). One lived and voted at Avon village, which is located on the refinery premises (Tr. 43). All of them had two and one-quarter hours after their regular quitting time in which to vote, and there has been no contention that this time was inadequate.

As for the time at which the men actually voted, some voted shortly after leaving work, but others attended to various other matters during the two hours taken off and did not vote until later. For example, one man upon whose claim recovery ultimately was allowed attended to various personal matters, cooked and ate dinner, and did not vote until 6:50 P. M. (Tr. 136-138).

On September 20, 1950, plaintiff-appellee, as the alleged assignee of 63 of the men who walked out, and to whom we will refer hereafter as the claimants, brought this action in the Justice Court to recover for each of them pay for the two hours taken off. Upon the trial defendant-appellant urged in oral argument and in its brief that the statute, properly construed, did not permit recovery, and that if construed to permit recovery it violated the Fourteenth Amendment of the Constitution of the United States. The court allowed recovery except upon the claims of two men

who had not voted. It disposed of the constitutional question with this brief statement in its opinion (Appendix A):

> "This section [section 5699 of the Elections Code] has been held to be constitutional as a fair and reasonable exercise of the State's Police Power. (*Ballarini* v. *Schlage Lock Co.* (1950), 100 ACA 751). We recognize this as sufficient precedent as to this point in this case."

The case was tried *de novo* in the Superior Court. The constitutional question again was raised in oral argument and in appellant's brief, a pertinent extract from which is attached hereto as Appendix B. However, the Court, without opinion, rendered judgment for plaintiff-appellee. It denied recovery upon the claims of the two men who did not vote and later corrected its judgment to deny recovery on the claims of two others who had voted on their way to work in the morning. It also denied recovery upon 13 claims for the reason that the assignments to plaintiff-appellee were defective. However, it allowed recovery on the remaining 46 claims.

Following entry of judgment in the Superior Court, defendant-appellant moved for a new trial upon the ground "that the statute as construed by this Court, and by the San Francisco Superior Court in *Ballarini* v. *Schlage Lock Company*, is in violation of section 1, Article XIV of the [amendments to the] Constitution of the United States." (Reporter's Transcript of proceedings on motion for new trial, p. 3; see also Points and Authorities in Support of Motion for New Trial). The motion was heard after rendition of the decision in *Day-Brite Lighting, Inc.* v. *State of Missouri*, 342 U. S. 421, in which the Supreme Court of the United States upheld a Missouri statute which allowed employees a total of four consecutive hours in which to vote

but entitled them to take only such time off from work as might be required to fill out the four hours. During the argument of the motion, there occurred the following colloquies relative to the construction placed upon the California statute by the Superior Court:

"Mr. Plant: * * *

"Now, you will see, Your Honor, that there is a very material and vital difference between the Missouri statute, as construed by the Missouri Courts, and the California statute as it has been construed here.

"Here, even though a man has two full hours after work, after his regular quitting time, within which to vote, the Court has held that he nevertheless is entitled to take two working hours off.

"The Court: Well, you are right, so far. Judge Morris'[2] and my construction have been different than the construction of the State Courts in Missouri.

"Mr. Plant: Right.

"The Court: I think that is right."

Reporter's Transcript of Proceedings on motion for new trial, p. 19.

"Mr. Plant: * * *

"Under the California statute as it has been construed here, if a man has a long work day ending at 7:00 p. m., he is entitled to take the two hours off between 5:00 and 7:00. He is entitled to two hours in which to vote. If, however, his regular quitting time is 5:00 p. m., then he is entitled to quit at 3:00 and thus has four hours in which to vote, and if his regular quitting time is 3:00 p. m., then he is entitled to quit at 1:00 p. m., and thus has six hours in which to vote, and if his regular quitting time is 1:00 p. m., then he is entitled to quit at 11:00 and has eight hours.

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[2] Judge Morris was the trial judge in *Ballarini* v. *Schlage Lock Company*, the decision which was affirmed by the Appellate Department of the San Francisco Superior Court (100 C. A. (2d) 859), 226 P. (2d) 771, and was relied upon as authority for the construction placed upon the California statute in the instant cause.

"The Court: I think that is what the statute says; whether it is constitutional or not that is another question.

"Mr. Plant: That is the problem.

"The Court: I think it says that. If you say it doesn't say that, then you have got to read into it other things that maybe ought to be in there, but whether it is constitutional, that is another question."

ibid., p. 22.

"The Court: Our statute just says that they may absent themselves for two hours. Missouri has done something which the California legislature tried to do, and which was vetoed by the Governor, or similar to that, that is true—put some reasonable regulations in the statute. They have a procedure set forth in their statute by which in a case where an employe wants to get off, he has to follow that procedure. We don't have that in our California statute, do we.

"Mr. Plant: That is correct, not in the statute itself, no."

ibid., p. 16.

"Mr. Dolgin: * * *, and the second thing is the fact that the Missouri statute contains the requirement that it should be at the employer's convenience, that makes it also quite a bit different.

"Mr. Plant: I should think it does. I think the fact that the Missouri statute provides that he must consult the employer does make it quite different. That provision is not in our statute aad as I say, under our statute as construed by the Court, everybody could just walk out and let the refinery blow up.

"The Court: Well, it is possible."

ibid., pp. 36-37.

In allowing recovery upon the 43 claims, the Superior Court necessarily held (1) that although the claimants had more than the statutory two hours after their regular quitting time in which to vote and although this time was ade-

quate, they nevertheless were entitled to take two hours off, with pay, from their scheduled working hours; and (2) that the claimants were entitled to select the two hours to be taken off unilaterally, and to walk out of the refinery in unison, without consulting their employer's convenience or necessities. In allowing recovery, the Court necessarily rejected the contention of defendant-appellant, raised as hereinabove set forth, that the statute, so construed, violated the Fourteenth Amendment.

The Questions Are Substantial

The questions presented are substantial and of the utmost public importance.

The statute, as construed by both the Justice and the Superior Courts, entitles an employee to take two working hours off, with pay, regardless of how much time he may have outside of working hours within which to vote. Thus, for example, a day worker whose regular quitting time is 4:45 P.M. and who has two and one-quarter hours thereafter in which to vote, and a shift worker whose regular quitting time is 10:45 A.M. and who has eight and one-quarter hours thereafter in which to vote, are each entitled to quit work two hours early, thus giving one a total of four and one-quarter hours and the other a total of ten and one-quarter hours in which to vote, and each is entitled to be paid for the two hours so taken.

Further, the statute entitles the employee to select the time to be taken unilaterally and without consulting his employer's convenience or necessities. Thus, on an election day, all of the employees in defendant-appellant's refinery are entitled to walk out in unison at any time upon which they may decide (as the employees in the mechanical department in fact did) and thus leave the costly and continuously operating equipment and installations of the refinery unattended.

The Missouri statute which was upheld by the Supreme Court of the United States in *Day-Brite Lighting, Inc.* v. *State of Missouri*, 342 U. S. 421, while similar in most of its wording to the California statute, had been construed very differently by the Missouri courts. That statute, which provided for a four hour absence from employment, had been construed by the Missouri Court of Appeals to mean simply that an employee was entitled to a total of four consecutive hours in which to vote and was entitled to take only such time from work as might be required to fill out the four hours. *State* v. *Day-Brite Lighting, Inc.*—Mo. App., 220 S. W. (2d) 783. In this connection the Court of Appeals had said:

> "One theory advanced is that under this section the employee is entitled to four hours' absence from his regular working hours on the day of election, whereas another theory advanced is that the employee is entitled to four hours' time in which to vote during the thirteen hours comprising an election day. This last stated theory, which we think is correct, means that if the employee's regular working day leaves him at least four consecutive hours on election day during which he would not be engaged in actual service to his employer, the object and purpose of the statute has been met, and such employee is not entitled to be absent from his regular working hours at all; or, if such time when the employee is not actually engaged in service to his employer is less than four hours (in this case two and one-half hours), the employer shall permit the absence of the employee from his services for a sufficient time (in this case one and one-half hours) to make up four full hours."

220 S. W. (2d), at 785-786.

The Court reversed a judgment convicting the employer for having refused to grant the employee four working hours

off and remanding the case for trial of the question whether the employer had violated the statute in refusing to pay for the one and one-half hours actually granted. Upon a subsequent appeal, the Missouri Supreme Court held that the statutory requirement that the employee be paid for the one and one-half hours granted was constitutional (*State* v. *Day-Brite Lighting, Inc.*, 362 Mo. 299, 240 S. W. (2d) 886), and it was this decision that was affirmed by the United States Supreme Court.

The Missouri statute was, in effect, a legislative determination that four consecutive free hours were reasonably necessary to assure all employees of an adequate opportunity to vote and that an employee therefore should be entitled to take such time off from work, without penalty by way of wage deduction, as might be required to fill out the four hours. The time, if any, which an employee was entitled to take off from work therefore was dependent upon how much time he had outside of working hours within which to vote.

It is a very different thing to say, as the California statute does, that an employee shall be entitled to a specified time off from work regardless of how much time he may have outside of working hours in which to vote. Such a statute simply grants a two hour paid holiday from work without relation to need for voting purposes and without relation to any standard based upon considerations germane to the end to be achieved.

In two opinions rendered in 1944, the California Attorney General rejected the foregoing construction of the California statute as "unreasonable" and held the statute constitutional only after construing it as entitling employees only to such time off as might be needed (Op. Att'y Gen. Cal., N. S., Nos. 5351, 5571).

The Missouri Court of Appeals, in rejecting the construction placed herein on the California statute, said:

> "If the State is correct in its view of the statute the employer would be compelled to grant absence on pay to the employee for four hours before 12:00 noon, regardless of the fact that such employee could be on his job until 12:00 noon and then have seven hours' time in which to vote. On this theory the employee would have eleven hours out of the election day thirteen hours.
>
> "If the views of the State are correct there would indeed be a constitutional question involved, not only under the 'due process' clause of Section 1, Amendment XIV to the Constitution of the United States, and Section 10, Article I, Constitution of Missouri, 1945, but also under the 'equal protection of the laws' clause of Section 1, Amendment XIV to the Constitution of the United States, and Section 14, Article I, Constitution of Missouri, 1945, because of an unnecessary, arbitrary and unreasonable burden being visited upon the employer, whether it be an individual or corporation, in order to accomplish the simple purpose of the employee having four hours on an election day in which to vote" 220 S. W. (2d), at 786.

The Supreme Court of the United States in upholding the constitutionality of the Missouri statute construed as hereinabove set forth, limited the effect of its decision in these words:

> "Extreme cases are conjured up where employer is required to pay wages for a period that has no relation to the legitimate end. Those cases can await decision as and when they arise. The present law has no such infirmity" (342 U. S., at 424).

In the only instances in which the higher courts of states have passed upon the constitutionality of statutes construed like the California statute, the statutes have been held un-

constitutional.[3] *Illinois Central R. Co.* v. *Commonwealth*, 305 Ky. 632, 204 S. W. (2d) 973; *People* v. *Chicago M, St. Pr. Co.*, 306 Ill. 486, 138 N. E. 155.

The foregoing is sufficient, we submit, to demonstrate the substantial nature of the question as to the constitutionality of a state statute which entitles an employee on an election day to take off a specified number of working hours with pay regardless of how much time he may have outside of working hours in which to vote. A statute which, depending upon the employee's regular quitting time, entitles one man to a total of four consecutive hours in which to vote, another to six, another to eight and another to ten, is capricious, the time granted being unrelated to any standard germane to a legitimate end. See *Meyer* v. *State of Nebraska*, 262 U. S. 390.

As already noted, there is the additional question whether the constitutionality of the statute is impaired by the fact that it authorizes employees to select the working hours to be taken off unilaterally and without consulting the convenience or necessities of their employer. This question is one of first impression. It was not presented in *Day-Brite Lighting, Inc.* v. *State of Missouri, supra*, because the Missouri statute expressly provided that the "employer may specify the hours during which such employee may absent himself" (342 U. S., at 422).

As hereinabove noted, under the California statute as the courts have construed it, all of the employees at appellant's refinery are entitled, on an election day, to walk out of the plant in unison at a time selected unilaterally by themselves and thus to leave unattended continuously operating equipment and other facilities costing millions of dollars. Employees of all other employers in the state have the

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[3] *People* v. *Ford Motor Co.*, 271 App. Div. 141, 63 N. Y. S. (2d) 697, and *Ballarini* v. *Schlage Lock Co.*, 100 C. A. (2d) Supp. 859, 226 P. (2d) 771, were both decisions by appellate divisions of *nisi prius* courts.

same right, including employees of public transportation systems and other utilities. We have never heard any suggestion as to what relation so drastic a provision can bear to any legitimate end, and we can think of none.

The California statute as construed in the instant case goes far beyond the Missouri statute upheld in *Day-Brite Lighting, Inc.* v. *State of Missouri, supra.* It is mischievous and imposes a burden upon employers which is arbitrary and unreasonable because unrelated to any legitimate end.

Dated: May 1st, 1952.

Respectfully submitted,

MARION B. PLANT,
BROBECK, PHLEGER & HARRISON,
Attorneys for Appellant.

APPENDIX "A"

Contra Costa County

604 Ferry Street

Martinez, California

OPINION

In Reference to Robison vs. Tide Water Associated Oil Company No. 5114—Justice Court, First Township, Martinez, California. Thomas P. Meehan, Presiding

Action to recover wages for time taken off to vote. This is an action brought under section 5699 of the California Elections Code, which section was enacted in 1891. The section reads as follows:

> Election Code,—Section 5699—
>
> "Every voter shall, on the day of every general, direct primary or presidential primary election at which he is entitled to vote, be entitled to absent himself from any service or employment in which he is then engaged for two consecutive hours between the time of opening and the time of closing the polls. The voter shall not, because of so absenting himself, be liable to any penalty, nor shall any deduction be made on account of such absence from his usual salary or wages."

This section has been held to be constitutional as a fair and reasonable exercise of the State's Police Power. (Ballarini vs. Schlage Locke Co., 1930, 100 ACA 751). We recognize this as sufficient precedent as to this point in this case.

It has been claimed in effect by Defendants, that a construction should be placed upon sec. 5699 by this court which would only allow an employee to take time off from his work in order to vote "when necessary". Defendant cites statutes in other jurisdictions which do expressly contain this requirement. He, likewise, cites statutes and company regulations defining other duties of employees; none

of these appear in Sec. 5699 Calif. Elections Code—enacted in 1891. The requirement "when necessary" may not be read into the statute. The Defendants should direct their desires to the State Legislature if they believe the section should be repealed or amended. This point was fully considered by the Trial Court in the California case of Ballarini v. Schlage Lock Co. which was a case similar to this, decided in 1950. The judge of that court then stated as follows: "A statute must be interpreted so as to give effect to the intent of the legislature at the time it was enacted. In the instant case the only evidence of legislative intent is the writing of the section itself. The section is clear, unequivocal, and unambiguous". This court finds no reason to differ with this decision.

It has been proposed by Defendants that "each of the employees in this case had fully opportunity to absent himself 'from employment' from and after 4:45 P. M." Section 5699 obviously does not refer to any such absence, as the evidence fully disclosed that the working hours of these employees terminate at 4:45 P. M. This contention of defendants must therefore fail.

This court has received sufficient legal evidence of valid assignments from Plaintiff's assignors, the employees involved in this case.

This court believes this sufficiently covers the pertinent legal issues brought before us in this case and forms adequate basis for decision.

Fifty-nine of Plaintiff's assignors have sufficiently shown that they were absent from defendant's employ for the purpose of voting and come within Sect. 5699 of the California Elections Code. Plaintiff is therefore entitled to judgment for wages accrued during these periods of absence under the section which reads in part: "The voter shall not be liable to any penalty, nor shall any deduction be made on account of such absence from his usual salary or wages".

Four of Plaintiff's assignors, J. B. Halderman and S. J. McNamara, K. J. Dias, and J. L. Woolen, have given no proof that they voted during their absence from Defendant's employ, and therefore Plaintiff is not entitled to judgment for wages as to these individuals.

Plaintiff is entitled to judgment and judgment is hereby rendered to Plaintiff and against Defendant for $218.05, less interest, and for costs of suit.

(Signed) THOMAS P. MEEHAN,
Justice of the Peace.

APPENDIX "B"

EXCERPTS FROM BRIEF OF DEFENDANT AND APPELLANT TIDE WATER ASSOCIATED OIL COMPANY IN THE SUPERIOR COURT

Plaintiff makes no claim that any of his assignors had less than two hours after their regular quitting time in which to vote. Nor does he claim that this time was inadequate. What he does claim is that although an employee has more than two hours before or after his regular working hours in which to vote, and that although this time is more than adequate, he nevertheless is entitled to take two hours off during working hours, with pay; and further, that he is entitled to do this without consulting the convenience of his employer.

We do not think that plaintiff's construction of the statute is the correct one. Nor do we think that the statute, if so construed, would be constitutional. These questions are basic and are of great importance to employers throughout the state.

* * * * * * *

We turn finally to the constitutional question.

In considering this question it should be kept in mind that the question is presented only if we are wrong in all of the contentions which we have made regarding construction of the statute. If we are correct in any one of those contentions, then plaintiffs are not entitled to recovery under the statute, and the court will have no occasion to consider the question whether it is constitutional. In short, the constitutional question is presented only if the statute means, as plaintiff contends, that an employee is entitled to two hours

off during working hours, regardless of need, and with pay, and further that he is entitled to select the time to be taken without consulting his employer's convenience. In the discussion which follows, therefore, we assume for the purposes of the discussion that this is the meaning of the statute.

The courts of last resort of two states have passed upon statutes construed as plaintiff would construe the statute here involved, and in both cases the statute was held unconstitutional. *People of the State of Illinois* v. *Chicago, Milwaukee & St. Paul Railway Company*, 306 Ill. 486, 138 N. E. 155;[4] *Illinois Central Railway Company* v. *Kentucky*, 305 Ky. 362, 204 S. W. (2d) 973, cert. den. 334 U. S. 843. The case last cited was decided in 1947, and certiorari was denied by the United States Supreme Court on June 14, 1948.

The only cases in which a statute so construed has been upheld are *People of New York* v. *Ford Motor Company*, 63 N. Y. Supp. (2d) 697,[5] one judge dissenting, and *Ballarini* v. *Schlage Lock Co.*, 100 Cal. App. (2d) Supp. 659, both of which were decisions by appellate divisions of *nisi prius* courts.

The constitutionality of the Missouri statute was sustained in the *Day-Brite* case, to which we have previously referred, but only after the statute had been construed in the manner advocated in an earlier part of his brief. *State of Missouri* v. *Day-Brite Lighting Co.* (Mo.), 220 S. W. (2d) 782, affirmed 240 S. W. (2d) 886. Even so the defendant has an appeal pending in the United States Supreme Court.

It may be conceded that assurance of employees of adequate time in which to vote is a legitimate object of legislative concern, and that statutory provisions reasonably related to that end and which do not interfere unnecessarily

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[4] See also *McAlpine* v. *Dimick*, 326 Ill. 252, 157 N. E. 235; *Reid* v. *Smith*, 375 Ill. 147, 30 N. E. (2d) 908; *Zelney* v. *Murphy*, 387 Ill. 492, 56 N. E. (2d) 754.

[5] However, the New York statute differed from the construction which plaintiff would place on the California statute in that it did not entitle the employee to select the time to be taken without consulting the employer's convenience.

with property rights or the right to contract would be constitutional. Thus it may be assumed for the purposes of the present discussion that a legislature could validly declare that all employees are entitled to two clear hours in which to vote and are entitled to take such time off from work as may be necessary to fill out the two hours (see *Day-Brite* case, *supra*); or that an employee is entitled to take such time off from work as may be needed to enable him to vote (see Attorney General's opinions, *supra*). It also may be assumed (although we do not think the assumption correct), that a legislature could validly require an employer to pay for needed time off on the theory that an employee would be reluctant to take needed time off if it would mean loss of pay for the time so taken.[6]

We can make the foregoing assumptions safely because none of them would justify the statute here under consideration. The provisions of that statute, as plaintiff construes them, are wholly unrelated to voting needs and impose an arbitrary burden upon employers. As plaintiff construes the statute, a man with an abnormally long workday ending at 7:00 P. M. would be entitled to quit work at 5:00 P. M. and thus would be given *two* hours in which to vote. A man whose normal workday ends at 5:00 P. M. would be entitled to quit work at 3:00 P. M. and thus would be given *four* hours in which to vote. A man whose normal workday ends at 3:00 P. M. would be entitled to quit work at 1:00 P. M. and thus would be given *six* hours in which to vote. And to

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[6] We say that this assumption is incorrect because we do not think the legislature can validly require an employer to pay an employee for time spent, not in the employer's service, but in the performance or exercise of civic duties or privileges. For example, we do not think that the legislature could require an employer to pay a man for time spent in military service or in public office. Similarly, we can think of no constitutional justification for requiring an employer to subsidize exercise of the voting privilege. When a man suffers an industrial accident, the accident flows from his employment, and that fact justifies a requirement that the employer bear some portion of the cost though not at fault. Exercise of the voting privilege bears no such relationship to a man's employment, and a requirement that an employer pay for time spent in exercising that privilege imposes upon him a burden which might be imposed with just as much justification upon the man's labor union or upon a complete stranger.

cite the extreme example, one of defendant's nightshift workers whose normal quitting time is 8:00 A. M. would be entitled to quit work at 7:00 A. M. and thus would be given *twelve* hours in which to vote; and this even though he lived and voted in Avon village, but a five minute walk from work.

It is obvious from the foregoing that the time allowed by the statute as construed by plaintiff has no relationship whatever to voting needs. By the same token, since the two hours taken from work are unrelated to voting needs, the requirement that the employer pay for those two hours is simply a requirement that he grant a two hour paid holiday.

We could see some justification for a statute which said that every employee should be entitled to two clear hours in which to vote. But we can see none for a statute which says that one man shall be entitled to two hours, another to four, another to six, another to eight, another to ten and another to twelve, all without any reference whatever to need or to any other standard based upon considerations germane to the purpose to be achieved. Nor can we see any justification whatever for a statute which requires an employer to pay for a portion of the time thus arbitrarily granted. The statutory requirements are not reasonably related to the end to be achieved and are unnecessarily and unreasonably burdensome upon the employer. This being true, the statute is unconstitutional. *McKay Jewelers, Inc.* v. *Bowron*, 19 Cal. (2d) 595; *Skalko* v. *City of Sunnyvale*, 14 Cal. (2d) 213. In the case first cited the court declared:

> "If, in the opinion of the court, a statute or ordinance purporting to be enacted to protect the public health, safety, morals, comfort, convenience or general welfare has no real or substantial relation to any of those objects, it is the duty of the court to so declare. A legislative body may not, under the guise of the police power, impose restrictions that are unnecessary and unreasonable upon the use of private property or the pursuit of lawful activities."

In *Ballarini* v. *Schlage Lock Co., supra*, the court conceded that though the purpose of a statute be entirely proper, the statute nevertheless cannot be sustained unless the means which it adopts "are reasonably necessary for the accomplishment of that purpose, and not unduly oppressive upon individuals" (100 Cal. App. (2d) Supp. at 862). The court then promptly proceeded to ignore the concession which it had just made by asserting that "Surely, any law that has for its purpose the insuring of a full and free performance of the right of elective franchise is in the public interest and tends to promote the general welfare" and is "a proper exercise of the state's police power".[7] We say that the court thus ignored the concession which it had just made because the court had just conceded that the validity of a statute depends not only upon its purpose but also upon the means adopted to accomplish that purpose. We agree with the court that insurance "of a full and free performance of the right of elective franchise" is a legitimate purpose of legislation, but it certainly does not follow that "any law" which has this for its purpose is thereby rendered constitutional. As the court itself had just conceded, the means adopted must be reasonably related to the purpose and must not be unduly oppressive upon individuals.

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[7] After holding the statute constitutional the court went on to say that the statute became a part of contracts of employment made subsequent to its enactment. However, the court certainly did not mean to say that a statute which is unconstitutional becomes a part of subsequent employment contracts. The basis of the decision was that the statute was constitutional.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 148

TIDE WATER ASSOCIATED OIL COMPANY,
Appellant,

vs.

L. G. ROBINSON, ON BEHALF OF OIL WORKERS INTERNATIONAL UNION LOCAL 445

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF CONTRA COSTA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

ROBERT L. CONDON,
LINDSAY P. WALDEN,
Counsel for Appellee.

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF CONTRA COSTA

No. 51972

L. G. ROBINSON, ON BEHALF OF OIL WORKERS INTERNATIONAL UNION LOCAL 445,
Plaintiff and Appellee,

vs.

TIDE WATER ASSOCIATED OIL COMPANY,
Defendant and Appellant

STATEMENT OPPOSING JURISDICTION

COMES NOW plaintiff-appellee, L. G. ROBISON, on behalf of Local 445, Oil Workers International Union, and submits the following matters and grounds making against the jurisdiction of the Supreme Court asserted by the defendant-appellant.

Opinions Below

No issue is raised by plaintiff-appellee as to defendant-appellant's statements in regard to the prior proceedings in this cause.

Jurisdiction

No issue is raised by plaintiff-appellee as to the dates of judgment of the Superior Court and of the subsequent proceedings therein; to the timeliness of the appeal to the Su-

preme Court, or to the fact that a direct appeal from the Superior Court lays to the Supreme Court in this cause; to the fact that Title 28 USC Sec. 1257(2) confers jurisdiction of the Supreme Court of the United States to review this decision by direct appeal, if otherwise the Supreme Court has jurisdiction.

Questions Presented

Exception is taken by plaintiff-appellee as to the substance of the manner of the questions presented by defendant-appellant. The questions should be amended by adding to each question "for the purpose of voting". This amendment was stipulated to by counsel on the hearing of the arguments on the Motion for new trial heard on March 31, 1952, and an Order Correcting Judgment Nunc Pro Tunc was filed April 29, 1952, in said Superior Court in accordance with the aforesaid stipulation. (See defendant-appellant's Statement as to Judisdiction, p. 7.)

Statement of the Case

Preliminarily, the statute herein involved relates to "every general direct primary or presidential primary election." In California, by other sections of the Elections Code (Sec. 24 and 25), the words "direct primary" and "presidential primary" are the same, except that the latter occurs every four years, and the former every two. Hence, we are concerned with two hours of time in June every other year, and two hours in every other November—a total of four hours in two years. Assuming that the average workman labors for forty hours a week for fifty weeks a year, this means we are litigating about four hours out of four thousand. No construction of the statute can enlarge the judicial determination in this case beyond the question

of the State's power to compel compensation for this one, one thousandth of the employee's working time.

Moreover, the statute, by its terms confers a privilege upon employees, with a corresponding duty upon employers if the privilege is exercised. There is no compulsion upon employees to take time off for voting and as defendant-appellant pointed out in its brief, only approximately 100 out of 1650 workers availed themselves of the privilege upon the day in question (Def't Brief, pp. 1, 3). Of course, the privilege can be waived, either by bargaining, individual or collective, or by non-user. In fact, as pointed out by counsel in his argument to the Court, the continuous operation men have waived their privilege by their agreement to remain operating until such time as they are relieved.

The above observations make it apparent that never have all the employees of defendant-appellant walked out unilaterally and in unison. It is true that a small group of the employees involved in this proceeding did so leave to vote when the employer arbitrarily revoked the industry practice of allowing employees the statutory privilege which they had enjoyed for many years prior to June of 1948.

Bearing in mind that the statute confers only a privilege, this privilege can be and has been waived by the continuous production workers. *The questions are not substantial.*

The issues involved here are not substantial. It has been a credo of the United States Supreme Court that it will not decide important constitutional questions unnecessarily or hypothetically. The basis of this appeal is on hypothetical grounds, to-wit: What will happen if, on an election day, all or a substantial proportion of defendant-appellant's employees walk out, leaving defendant-appellant's facilities untended (Defendant-Appellant's Statement as to Jurisdiction, p. 10). This, absurd to contemplate, situation has

never happened in the life of the sixty-one year old statute, and never will happen. This hypothetical situation, we contend, is the extreme case referred to by the Supreme Court's latest decision on the exact constitutional point which is involved here (*Missouri v. Day-Brite Lighting, Inc.*, (342 U.S. 421).)

Secondly, on June 24, 1951, Governor Earl Warren of California vetoed an amendment to the statute in question. His veto message is attached hereto as Appendix "A". In this message the Governor stated:

> "It appears to me that it is not desirable to tinker in this manner with a law that has been in existence for 60 years and which, with the exception of two minor cases presented to me, has worked satisfactorily and in furtherance of a sound public policy for such a period of time. The two instances used as an argument for the bill involved not more than 100 employees altogether."

This appeal also contravenes another policy of the Supreme Court. This policy is not to renew cases where the decision of the State Court is so plainly right, especially if it is in accordance with the judgment of the Supreme Court in similar cases (*Spcis* vs. *Illinois*, 123 U.S. 131).

In *Missouri* vs. *Day Brite Lighting, Inc.* (342 U.S. 421) the constitutional issue involved herein was fully and completely settled. In that case the Court stated that it is unquestionably constitutional for a State Legislature to require employers to pay employees for time off taken for the purpose of voting on Election Day. Wherein does the California statute vary but in detail? These details do not raise any constitutional issues. If it is constitutional to allow a State Legislature to decide in its wide latitude for experimentation that an employee must be compensated for

time off work, then the manner in which the statute is to be executed certainly presents no problem for the United States Supreme Court. Rather, it is for the State Legislature to solve this problem by experimentation (*Missouri* vs. *Day Brite Lighting, Inc., supra*).

However, the California statute has worked well (see Governor Warren's Veto Message, Appendix "A"). If it has not worked to the satisfaction of defendant employer, the latter should see that the statute is amended with reasonable amendments. The California statute then is well within the limitations of the *Day Brite* decision.[1]

The next impediment to Supreme Court jurisdiction on review is the impediment of prematurity. As is well demonstrated by defendant-appellant's statements, the California section herein involved has been construed judicially only twice in California, and both times by Superior Court judges. It is conjectural therefore to pass on the constitutionality of the construction of a statute which never has been considered by the state's own Supreme Court.

For the foregoing reasons, the appeal herein is without merit.

> "The Supreme Court will not review a State judgment where the asserted Federal right is so wanting in foundation and so unsubstantial as to be devoid of all merit and frivolous or where it is at most conjectural as to whether the party will be deprived of any constitutional right."
>
> 54 Am. Jur. United States Courts, Sec. 191- - -
> *Calif. Water Service* vs. *Redding* (304 U.S. 252)
> *Abrams* vs. *Van Schaick* (293 U.S. 188)

Plaintiff-appellant respectfully submits that the matters presented do not come within the proper appellate juris-

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[1] Extracts from Plaintiff's Brief on Appeal to the Superior Court appear as Appendix "B."

diction of the Supreme Court of the United States; that no federal question is involved, and that said appeal should be dismissed.

Respectfully submitted,

ROBERT L. CONDON,
LINDSAY P. WALDEN,
Attorneys for Plaintiff-Appellant.

APPENDIX "A"

STATE OF CALIFORNIA, GOVERNOR'S OFFICE,
SACRAMENTO 14, JUNE 21, 1951

To the Honorable Members of the Assembly, State of California, Sacramento, California:

GREETINGS: I am returning herewith, without my signature ASSEMBLY BILL NO. 2665, entitled: "An act to amend Section 5699 of the Elections Code, relating to casting of ballots."

My objections to the bill are as follows:

This bill amends Section 5699 of the Elections Code which provides that employees may on certain elections days have two hours off from work during the time when the polls are open. This bill would greatly restrict this provision by making it inapplicable if the employee has two consecutive hours, either before or after his scheduled hours of employment, during the period when the polls are open. Provision is made for an extra one-half hour in the event transportation time makes such provision necessary.

I believe that it is in the interest of sound government for our working people to be encouraged to vote and that it is not too much to ask of an employer to encourage widespread voting by releasing his employees for a period of time on election day. The exercise of the right of franchise should be encouraged rather than discouraged. Since this provision has been on our statute books for sixty years, I do not believe that it should now be seriously impaired. I believe that employers and employees should cooperate in the exercise of this right. If the bill merely required notice on the part of the employee of the time he required for voting, and within reasonable limits provided for the time to be taken, so that it would least interfere with the employee's work, I would be willing to sign it. However, this bill goes much further.

It provides that the employer may not only specify the time of absence but also provides that he shall grant such

additional time as is necessary not to exceed one-half hour in those cases where two hours is inadequate for travel between the voter's polling place and his place of employment. This provision would itself be provocative of disputes. It appears to me that it is not desirable to tinker in this manner with a law that has been in existence for sixty years and which, with the exception of two minor cases presented to me, has worked satisfactorily and in furtherance of sound public policy for such a period of time. The two instances used as an argument for this bill involved not more than one hundred employees altogether.

This bill was a highly controversial one in the Legislature and passed in the Assembly by a vote of 41 to 36. The Assembly concurred in Senate Amendments by a vote of 43 to 22. The Senate adopted the bill by a vote of 22 to 11. In view of the long existence of this right and the few instances of abuse that have been claimed, I am returning the bill, which restricts this right, without my approval.

Respectfully submitted,

EARL WARREN,
Governor.

Assembly Bill No. 2665 ordered to unfinished business file.

Acknowledgement of Receipt of Assembly Bill No. 2665
June 22, 1951.

I acknowledge receipt this twenty-second day of June, 1951, at 8:30 o'clock p.m., of Assembly Bill No. 2665 without the Governor's signature, together with a statement of his objections thereto signed by the Governor, delivered to me personally by Beach Vasey, Legislative Secretary to the Governor.

ARTHUR A. OHNIMUS.

APPENDIX "B"

EXTRACTS FROM BRIEF OF PLAINTIFF-APPELLEE IN THE SUPERIOR COURT

In considering constitutionality, it should be noted, of course, that the field is not static. The State's power under the Fourteenth Amendment validly to legislate has expanded and narrowed as the economic conditions and the Supreme Court itself have changed over the past seventy years.

It is almost axiomatic that in considering the constitutionality of a statute, every presumption and intendment will be indulged in favor of it being reasonable and valid.

> "It hardly seems necessary in discussing the constitutionality of said measure to call attention to the well-established and universally recognized principal of law that all presumptions and intendments are in favor of the constitutionality of a statute enacted by the legislature; all doubts are to be resolved in favor and not against the validity of a statute; that before an act of a coordinate branch of the government can be declared invalid by the judiciary for the reason that it is in conflict with the Constitution, such conflict must be clear, positive, and unquestionable; and in case of a fair and reasonable doubt as to its constitutionality, the statute should be upheld and the doubt resolved in favor of the expressed wishes of the people as given in the statute. (5 Cal. Jur. p. 628; *Legal Tender Cases*, 12 Wall. 457, 531 [20 L.Ed. 287]; *Sinking Fund Cases*, *Union P.R. Co.* vs. *United States*, 99 U.S. 700, 718 [25 L.Ed. 496]; *Trade-Mark Cases*, *United States* vs. *Steffens*, 100 U.S. 82, 96 [25 L. Ed. 550]; *In Re Spencer*, 149 Cal. 396, 400 [86 Pac. 896, 117 Am. St. Rep. 137, 9 Ann. Cas. 1105]; *People* vs. *Globe Grain & Mill Co.*, 211 Cal. 121, 127 [294 Pac. 3].)"
>
> *Jersey Maid Milk Products Co.* vs. *Brock* [(1939) 13 C. (2d) 620, 636].

It is conceded that in the instant cause there is a taking of property, i.e. wages paid for two hours wherein no work

was performed. But, in consideration of the objectives of this statute, it is submitted that the act falls well within the regulatory powers of the State. Situations and cases are legion where the State and Federal Government have intervened in the affairs of individuals with all forms of regulatory programs, and such interventions have been considered valid as they have benefited the general welfare of the public of the state (See *Nebbia* vs. *New York*, 291 U.S. 502, 78 L.Ed. 940, 54 S.Ct. 505; *West Coast Hotel Co.* vs. *Parrish*, 300 U.S. 379, 81 L.Ed. 703, 58 S.Ct. 578; *Jersey Maid Milk Products Co.* vs. *Brock*, 13 C(2d) 620, and cases cited therein; *Ray* vs. *Parker*, 15 C. (2d) 275; 11 A.Jur. 267, 268, et. seq.). Compare the Regulations cited above requiring pay for ten minute rest periods for women and minors.

The constitutionality in each instance depends upon the reasonable exercise of the police power employed. In determining the question of validity, it has been held that "A Court is not concerned with the wisdom of the policy of the law and cannot substitute its judgment for that of the legislative body. If different minds might differ as to the reasonableness of the regulation, the law must be upheld (*Ballarini vs. Schlage Lock Co.*, 100 ACA 751, 754). The criteria of reasonableness can only be determined by an examination of the purpose of the objective of the statute, and in 5 Cal. Jur. 630 we find the following: "If there is any doubt, the expressed will of the Legislature should be sustained." In holding the similar regulation reasonable and a similar act constitutional, the New York Court, in *People* vs. *Ford Motor Co.* (1946) 63 NYS (2d) 697, constituted the objective of the regulation in that it was

> ". . . to avoid evils, to increase the right of suffrage, to keep it pristine and render it efficient . . . all this pertains to the public welfare and, in the attainment of those objectives, the burden which the statutes case upon all in the role of the employer is one lawfully placed in a design for the common good, and the burden is so slight that it may not be said to be unduly op-

pressive. That the burden may bear unequally does not render its placement unlawful." (P. 699.)

A writer in 47 *Columbia Law Review* 135 has made an exhaustive study of statutes similar to the one in question. The Memorandum Opinion of Judge Morris attached to the brief before Judge Meehan quotes at length from this excellent note on the question of due process. The writer notes that similar election code provisions have been upheld in some states and in others declared void. (This comment is likewise made by the Court in the *Ballarini case* (p. 753).) The author of the note points out that the "pay while voting requirement bears a considerable resemblance to minimum wage legislation. There is a marked similarity between requiring an employer to pay a minimum wage totaling a fixed amount per week for 40 hours work and compelling him to pay the same amount for 38 hours work during a particular week in the year" (p. 137).[2] In noting that the trend is in favor of such legislation, the author concludes that "Courts should not substitute their judgment in the economic realm. The way to insure employees' right to vote is best left to legislative judgment" (P. 139).

We therefore conclude that the Legislature has the right under the Constitution to give voters a privilege, which they may or may not exercise, of taking four hours off every two years with pay, providing that they actually vote on the two election days.

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[2] In a similar category we would find legislation requiring vacations with pay. Such legislation is now found in Great Britain, France, Poland, Denmark, and other European countries (47 Col. L. R. 135 at 139).

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF CONTRA COSTA

No. 51972

L. G. Robison, on behalf of Oil Workers International Union, Local 445, *Plaintiff-Appellee*,

vs.

Tide Water Associated Oil Company, *Defendant-Appellant*.

Motion to Dismiss or Affirm

Comes Now the plaintiff-appellee, L. G. Robison, and moves this Court to dismiss with costs the appeal taken herein to this Court upon each of the following grounds:

1. The want of any substantial Federal question in that the decision of the Superior Court of the State of California, in and for the County of Contra Costa is fully sustained by direct decisions of the Supreme Court of the United States covering the same matters at issue.

2. The want of any Federal question in that no showing was made in the said Superior Court that the statute in question deprived or would, under the construction given the statute by said Court, operate to deprive any person of property without due process of law.

3. That the questions attempted to be presented are not judicial questions but rather legislative matters having to do with the manner of conducting elections.

4. For such other and further reasons as are set forth in the statement filed herewith by plaintiff-appellee of the matters and grounds making against the jurisdiction of this Court, pursuant to the Supreme Court Rule 12, paragraph 3.

In the alternative appellees and respondents move this Court to affirm the decision of the Superior Court of the State of California, in and for the County of Contra Costa, rendered on the 4th day of February, 1952, upon the ground that the questions upon which the decision of the cause

depend are so unsubstantial as to need no further argument, and because all of the questions presented have been conclusively determined by the decisions of the Supreme Court of the United States foreclosing the subject.

Dated this 15th day of May, 1952.

ROBERT L. CONDON,
LINDSAY P. WALDEN,
Attorneys for Plaintiff-Appellee.

Office - Supreme Court, U. S.
FILED
JUN 23 1952
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM 1951

No. 148

TIDE WATER ASSOCIATED OIL COMPANY,
Appellant,

vs.

L. G. ROBISON, on behalf of OIL WORKERS INTERNATIONAL UNION, LOCAL 445,
Appellee.

Opposition of Appellant to Appellee's Motion to Dismiss or Affirm

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In the Supreme Court of the United States

OCTOBER TERM 1951

No. .....

TIDE WATER ASSOCIATED OIL COMPANY,
Appellant,

vs.

L. G. ROBISON, on behalf of OIL WORKERS INTERNATIONAL UNION, LOCAL 445,
Appellee.

Opposition of Appellant to Appellee's Motion to Dismiss or Affirm

Appellee has accompanied his statement opposing jurisdiction with a motion to dismiss or affirm. In support thereof, he argues in substance (1) that the case is controlled by the decision of this Court in *Day-Brite Lighting, Inc. v. State of Missouri,* 342 U.S. 421, (2) that only 100 out of 1650 employees walked out of the refinery, the rest having "waived" their right, and (3) that the state Supreme Court, if and when the question reaches it, may place a

different construction upon the statute than was placed upon it by the decision herein. We will dispose of these contentions briefly and in the order in which they have just been stated.

(1) The statute upheld by this Court in *Day-Brite Lighting, Inc. v. State of Missouri, supra,* did not entitle an employee to take time off from work, with pay, regardless of how much time he might have outside of working hours in which to vote; it entitled him to take time off from work only if and to the extent necessary to give him four consecutive hours free between the opening and closing of the polls. Furthermore, the Missouri statute did not permit the employee to select unilaterally the time of his absence from work, but expressly reserved to the employer the right to specify the time.

In contrast, the California statute, as construed below, entitles all employees to two working hours off, with pay, regardless of how much time they may have outside of working hours in which to vote and, further, allows them to select the time to be taken unilaterally without consulting their employer. These differences between the California and Missouri statutes are discussed in our Statement as to Jurisdiction and in Appendix B thereto, and we refer the Court to that discussion. The differences are significant and, we submit, raise a substantial question as to whether the California statute conflicts with the due process clause of the Fourteenth Amendment.

(2) We question appellee's assertion that the statutory right can be waived "by bargaining, individual or collective," and that appellant's employees engaged in continuous

operations have waived their right by agreement.* Be this as it may, however, the fact is that approximately one hundred employees in appellant's mechanical department did walk off the job, that they did so at a time selected by themselves unilaterally and without consulting appellant, and that 46 of those whose claims were prosecuted were allowed recovery.† To argue that they might, if they chose to do so, enter into an agreement waiving this statutory right obviously is not an answer to the constitutional objections which we raise.

(3) Appellee does not question that the Superior Court was the highest court of the State in which a decision could be had in the instant case; his argument is that some future case may reach the state Supreme Court, or a District Court of Appeal, and may result in a construction of the statute different from that adopted herein and not subject to the constitutional objections which we have raised. In view of the fact that an individual's statutory claim is limited to pay for two hours, the possibility of there arising a civil case of sufficient magnitude to fall within the appellate jurisdiction of the state Supreme Court or District Courts of Appeal is remote; it is unlikely that the statute will ever

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*We do not think that the statutory right can be waived by agreement any more, for example, than can rights conferred by the Fair Labor Standards Act. Appellee's reference in his Statement Opposing Jurisdiction to an assertion by "counsel" that the right can be waived refers to an assertion by his own counsel, not to anything that we have said.

†As noted in our Statement as to Jurisdiction, recovery was allowed on all claims excepting only those of two men who did not vote, those of two men who voted on their way to work in the morning, and those of 13 men whose assignments to appellee were invalid.

reach those courts except, possibly, by way of a criminal prosecution.

Again, however, appellee's argument misses the point. Inasmuch as the Superior Court was the highest court of the State in which a decision could be had in the instant case, its decision, notwithstanding the fact that it normally is only a trial court, is appealable to this Court. *Grovey v. Townsend*, 295 U.S. 45, 47; *Kentucky v. Powers*, 201 U.S. 1, 37-39; *Marine v. Ragen*, 332 U.S. 561; *Canizio v. New York*, 327 U.S. 82. It is no answer to the fact that appellant has been deprived of its constitutional rights, and that its only remedy is in this Court, to say that in some future case it, or some other employer, might have a remedy in the state courts.

We respectfully submit that appellee's motion to dismiss or affirm should be denied.

Dated: June 4, 1952.

MARION B. PLANT
BROBECK, PHLEGER & HARRISON
Attorneys for Appellant

Office-Supreme Court, U.S.
OCT 27 1952

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 148

TIDE WATER ASSOCIATED OIL COMPANY,
Appellant,

vs.

L. G. ROBISON, on Behalf of OIL WORKERS INTERNATIONAL UNION LOCAL 445,
Appellee.

Petition for Rehearing After Order Granting Motion to Affirm

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